SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley Mot. Seq. 020
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E** Hon. Andrea Masley Mot. Seq. 021

MEMORANDUM OF LAW IN OPPOSITION TO INSURERS' MOTION FOR PARTIAL REVIEW AND MODIFICATION OF THE FEBRUARY 26, 2019 MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER REGARDING THE INSURERS' OMNIBUS MOTION TO COMPEL

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Defendants the National Football League ("NFL") and NFL Properties LLC ("NFL Properties") (together, "the NFL parties") respectfully submit this memorandum of law in opposition to the Insurers' Motion for Partial Review and Modification of the Memorandum & Order of Special Referee Michael Dolinger Regarding The Insurers' Omnibus Motion to Compel.

PRELIMINARY STATEMENT

The instant motion is one of three filed by the Insurers challenging key aspects of the Special Referee's careful, balanced, and thorough 80-page opinion, which ruled for and against each side after extensive briefing and eight hours of oral argument on the five motions pending before him. The NFL parties have chosen not to challenge those aspects of the opinion that denied the relief they sought whereas the Insurers are seeking to overturn those portions of the opinion that correctly rejected their arguments. This and the Insurers' other two motions seeking review should be denied as meritless.

This review motion concerns the most routine type of discovery dispute—the scope of the search to be conducted to locate responsive documents. In their "Omnibus" motion to compel before the Special Referee, the Insurers sought to add several additional categories of documents and broaden the search of the NFL parties' files through the use of new search terms and new document custodians after an initial search had already been completed. In nearly every respect, the Insurers won. The Special Referee ordered the use of the great majority of the Insurers' proposed additional forty-six search terms and ordered the NFL parties to search the documents of ten additional custodians, using a total of sixty-three search terms. *See* Mem. & Order at 50–51, 53–54. Additionally, the NFL parties voluntarily agreed to produce or have produced (a) certain documentation relating to the underlying players' claims, which the Special

Referee determined satisfied the Insurers' demand for specific settlement damages information; (b) certain substantive communications with opt-out players and their counsel, which the Special Referee determined satisfied the Insurers' demand for opt-out communications; and (c) certain indemnity agreements, resulting in the Special Referee's determination that no litigable dispute remained regarding indemnity agreements. *See id.* at 54–57.

Unsatisfied with the extent of their victory, the Insurers now complain that the Special Referee was wrong (i) to reject as unnecessary or unsupported seven of their forty-six proposed additional search terms and (ii) to rule that the indemnity-agreement controversy had been mooted by the NFL parties' voluntary production. But neither of these complaints has merit, and they certainly do not come close to meeting the standard for reversing the Special Referee's reasonable, discretionary decision. The Special Referee carefully considered the arguments of both sides and, based on the evidence before him, expanded the scope of the NFL parties' production by ordering most, but not all, of what the Insurers requested. The Insurers' nitpicking around the edges of the Special Referee's reasoned order is not only without merit, it needlessly burdens the Court with further litigation of a truly unexceptional discovery matter that should have been put to bed.

STANDARD OF REVIEW

The Insurers' motion should be denied no matter what standard of review the Court applies to the Special Referee's rulings. Nevertheless, when reviewing a referee's order under CPLR 3104(d), the Court may limit its review to whether the referee's order is "clearly erroneous or contrary to law." *CIT Project Fin. v. Credit Suisse First Boston LLC*, No. 600847/2003, 2005 WL 729528, at *2 (Sup. Ct., N.Y. Cty. Feb. 25, 2005) (rejecting the argument that a *de novo* standard of review should apply); *see also, e.g.*, *Genger v. Genger*, No. 100697/2008, 2016 WL 3442353, at *1 (Sup. Ct., N.Y. Cty. June 21, 2016) (adopting the

"clearly erroneous or contrary to law" standard of review).[1] The Court may affirm the referee's decision on any ground supported by the record. *See, e.g.*, *Emp'rs Ins. of Wausau v. Am. Home Prods. Corp.*, 238 A.D.2d 154, 154–55 (1st Dep't 1997).

ARGUMENT

The Insurers fall far short of demonstrating that Special Referee Dolinger's decision regarding search terms and indemnity agreements was clearly erroneous, and they make no attempt to argue that Special Referee's decision was contrary to law. Following voluminous briefs and lengthy oral arguments on these issues, the Special Referee carefully explained his decisions that most of the Insurers' search terms be used and that there was no litigable dispute regarding the indemnification agreements, articulating the factors upon which his decisions were based. Because Special Referee Dolinger's carefully reasoned decision was not clearly erroneous and was consistent with applicable law, this Court should affirm.

I. Search Terms

Special Referee Dolinger granted the Insurers' request for additional search terms in large part, ordering the use of thirty-two of the Insurers' proposed forty-six search terms—in addition to the thirty-one search terms the NFL parties have already used. *See* Mem. & Order at 50–51.

[1] We respectfully submit that the "clearly erroneous or contrary to law" standard is especially appropriate here given (i) the Special Referee's vast experience resolving discovery disputes during his more than 30 years as a United States Magistrate Judge and his work as a JAMS neutral, and (ii) the self-evident care that the Special Referee exercised in considering the voluminous briefing of these issues and the full-day of oral argument, as reflected in his 80-page single-spaced Memorandum & Order.

The Insurers now quibble about seven of the terms Special Referee Dolinger declined to order. In doing so, they rely on strained arguments, many of which are being raised for the first time before this Court. But even considering these new arguments, the Insurers fail to show that the Special Referee's decision was not supported by the factual record or inconsistent with applicable law. Nor could they. This was a manifestly reasonable decision easily within the bounds of the Special Referee's informed discretion.

The Special Referee weighed numerous factors in deciding which additional search terms, if any, he should direct the NFL parties to use, starting with the basic premise that search terms should "yield an adequate production of relevant documents." *Id.* at 48. He considered the possibility of overlap between terms, the ability to "de-dupe" (remove duplicative) results, the potential burden to the NFL parties, the stakes at issue in this case, and the Insurers' explanations for the search terms. *Id.* at 49. In weighing all of these factors, he arrived at his decision after comparing the carriers' proposed list to the list of search terms already used by the NFL parties. *See id.* at 50. His decision is easily supported by the above considerations, none of which the Insurers argue was inappropriate for the Special Referee to take into account.

The Insurers are wrong to suggest that a search term is appropriate merely because it would result in some responsive material. *See* Insurer Mem. at 8. Many search terms would result in responsive material (e.g., "football," "head") but are plainly inappropriate because they would capture a disproportionate amount of unresponsive material. Further, the Insurers' repeated emphasis that the NFL parties can easily de-dupe duplicative results is misguided. *See id*. at 5–7. The NFL parties' burden does not lie with removing documents that the previous search terms had already captured, but with sifting through irrelevant documents that would be captured by the additional terms the Insurers propose.

As to the seven specific contested terms, Special Referee Dolinger was correct that they were not necessary to yield an adequate production of relevant documents. A close examination of these terms shows they would do virtually nothing to enhance the yield of relevant documents, while at the same time unnecessarily capturing a disproportionate number of irrelevant documents. Accordingly, the decision to exclude these terms was reasonable.

The Special Referee's decision to exclude [redacted] was plainly supported by the record. Crafting particularized search terms for names is especially important in the context of searching the NFL parties' files, which contain myriad documents listing players both past and present. [redacted]

The decision to exclude [redacted] is also supported. The amount of irrelevant material these terms would capture far outweighs the negligible relevant material, if any, that has not already been captured by existing terms. Mark Kelso was a 9-year veteran of the NFL, playing in four consecutive Super Bowls. [redacted] There is no good reason for the NFL parties to have to comb through every document that does nothing more than mention the name of a 9-year NFL player. Similarly, using the term [redacted] would likely result in many irrelevant hits, including news reports, while pulling in information, if any

at all, which is only tangential at best to the case—the classic example of a fishing expedition. These factors plainly support the Special Referee's determination that the terms [redacted] were unnecessary and inappropriate.

Nor was declining to include [redacted] clearly erroneous. Both [redacted] long post-date the filing of the underlying litigation and insurance policies at issue. *See* Aaronson Aff. Ex. 2 at NFL Mem. at 10.[2] For that reason, there can be no relevant documents concerning these issues. Even if the Insurers were correct that communications discussing [redacted] were relevant (which they are not), the Special Referee's decision would still be supported by the record, because those communications would likely be captured by existing search terms, such as [redacted].[3] *See id.* at Watson Aff. Ex. 18.

Finally, the Special Referee's decision to omit the terms [redacted] was also supported by the evidence. Unlike the [redacted] on the Insurers' annotated list of proposed search terms submitted to Special Referee Dolinger, the descriptions for [redacted]

[2] Exhibit 2 to the Affirmation of Matthew J. Aaronson, dated March 14, 2019 ("Aaronson Aff."), contains the NFL parties' initial opposition papers before the Special Referee, including the Affirmation of Colin P. Watson and its 38 attached exhibits.

[3] That the NFL parties included [redacted], in their initial search term list shows that adding [redacted] is not necessary or appropriate and does not establish, as the Insurers suggest, that the NFL parties conceded [redacted] relevance. The Insurers, not the NFL parties, crafted the initial search term list using [redacted] *See* Aaronson Aff. Ex. 2 at NFL Mem. at 9.

[redacted] did not explain how they were relevant to the case. *See* Aaronson Aff. Ex. 1 at Almond Aff. Ex. P. Indeed, the description for [redacted] fails to explain [redacted], giving the Special Referee abundant support for not including the term. *See id.* Special Referee Dolinger's decision to omit [redacted] was supported by the evidence before him, and the Insurers have waived any right to belatedly explain how [redacted] were relevant. *See Hexcel Corp. v. Hercules Inc.*, 291 A.D.2d 222, 223 (1st Dep't 2002).

II. Indemnity Agreements

The record easily supports the Special Referee's conclusion that, at the present time, there is no litigable dispute about the adequacy of the NFL parties' production of indemnity agreements. He based his decision on the evidence presented before him at oral argument, namely, counsel's attestation that (1) the NFL parties' would produce all requested indemnity agreements [redacted] and certain communications pertinent to it, and (2) that there was no indemnification agreement pertinent to the current case regarding the NFL's relationship with its constituent teams and that the teams' obligations to the NFL are reflected in the NFL's by-laws and constitution, which have already been produced. *See* Mem. & Order at 56.

The Insurers had the opportunity to argue that this production of indemnity agreements was insufficient, as they unpersuasively attempt to do here. But they did not. In response to the Special Referee's request to clarify what exactly they wanted the NFL parties to produce, counsel for the Insurers simply noted there was a disagreement about "what's indemnity and what's not." *See* Aaronson Aff. Ex. 6 at 219:3–21:9. The Special Referee was correct to conclude that the produced documents were sufficient to satisfy the Insurers' requests, and his

determination that there was no litigable dispute on this issue was supported by the evidence before him and not clearly erroneous.

Before the Special Referee, the debate over any alleged indemnity agreement between the NFL and the clubs focused on the meaning of the term "indemnity." *See* Aaronson Aff. Ex. 6 at 221:2-17. Counsel for the NFL parties explained that the NFL's by-laws and constitution establish the relationship between the member clubs and the NFL, and that these documents provide that, similar to a partnership, the League's assets and liabilities are split evenly among the 32 member clubs. *See id.* at 220:4-25. Regardless of the outcome of the debate, any relevant obligation of the clubs to indemnify the NFL would be within the by-laws and constitution. Because these documents had already been produced, the Special Referee's decision that no litigable issue existed was supported by the record.

Regarding the indemnity agreements with [redacted], the Special Referee concluded that the NFL parties' production of any [redacted] agreements and related communications resolved the issue. This decision was amply supported, and the Insurers offered no reason to think that the production would not be sufficient to satisfy their requests.[4]

Finally, while the Insurers do not mention it, the Special Referee specifically noted that the Insurers were free to continue to pursue the issue of what they contend to be the clubs'

[4] The NFL parties maintain their arguments presented before the Special Referee that the Insurers are not entitled to any indemnity agreements as a matter of right because they are irrelevant to the pleadings of this action. *See* Aaronson Aff. Ex. 2 at NFL Mem. at 22–23 (citing cases). This Court need not reach that issue by affirming the Special Referee's decision as not clearly erroneous.

supposed indemnification obligations in deposition discovery. *See* Mem. & Order at 56. If deposition testimony yields a "different picture," the Special Referee made clear that the Insurers could renew their document requests. *See id*. But a "different picture" in the future does not change the present picture, and Special Referee Dolinger's view of the present picture is supported by the evidence. At this point, his decision that there is no litigable issue concerning document discovery of indemnity agreements is well supported and correct.

CONCLUSION

For the foregoing reasons, the Insurers' motion for partial review should be denied in its entirety.

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